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IN THE

# Supreme Court of the United States

October Term, 1970

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No._____

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ROBERT C. STUBBS and
MARY ANN STUBBS,
husband and wife,
Petitioners

v.

UNITED STATES OF AMERICA,
Respondent

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## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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The Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in the above case on June 16, 1970.

### OPINIONS BELOW

There was no opinion rendered by the United States District Court for the District of Arizona; however, the instructions to the jury and the jury verdict are unofficially reported in 68-2 U.S.T.C.

par. 9570 and are printed in the Appendix at pages 10-14. The opinion of the Court of Appeals for the Ninth Circuit is not yet reported; however, the original opinion of the Court below is printed in the Appendix at pages 15-18, and the modification of the opinion is printed in the Appendix at pages 19-20.

## JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was made and entered on June 16, 1970 and is printed in the Appendix at page 21. Petitioners filed a timely Petition for Rehearing on June 30, 1970 which was denied on July 16, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Is it error to inquire into the subjective judgment which prompts the voluntary, financial support of a charity, where the donor receives no legal consideration therefor, in order to determine its deductibility as a charitable contribution under Section 170 of the Internal Revenue Code of 1954.

2. Does the possibility of receiving certain benefits from a transfer to charity prevent a charitable deduction under Section 170 of the Internal Revenue Code of 1954 even though such benefits are never realized or are far outweighed by detriments resulting from such transfer.

## STATUTES INVOLVED

*Internal Revenue Code of 1954*

§170. CHARITABLE, ETC., CONTRIBUTIONS AND GIFTS.

(a) Allowance of Deduction.—

(1) General Rule.—There shall be allowed as a deduction any charitable contribution (as defined in subsection (c)) payment of which is made within the taxable year. A charitable contribution shall be allowable as a deduction only if verified under regulations prescribed by the Secretary or his delegate.

• • •

(c) Charitable Contribution Defined.—For purposes of this section, the term "charitable contribution" means a contribution or gift to or for the use of —

(1) A State, a Territory, a possession of the United States, or any political subdivision of any of the foregoing, or the United States or the District of Columbia, but only if the contribution or gift is made for exclusively public purposes.

• • •

(26 U.S.C. 1964 ed., Sec. 170.)

## STATEMENT OF THE CASE

The underlying action was brought by Petitioners in the United States District Court for the District of Arizona for the refund of federal income taxes for the year 1963, in the amount of $11,930.89 plus statutory interest, which were alleged to have been erroneously assessed against Petitioners by the Commissioner of Internal Revenue. The additional income tax resulted from the disallowance of a charitable contribution deduction taken by the Petitioners on their timely filed joint federal income tax return for the calendar year 1963. On September 14, 1966, Petitioners paid the additional income tax and on November 21, 1966, they filed a timely claim for refund with the Commissioner. This claim was disallowed by the Commissioner on March 20, 1967, and on May 3, 1967, a complaint was filed by the Petitioners in the District Court. The jurisdiction of the District Court was invoked under 28 U.S.C. Section 1346(a)(1). The case was tried before a jury and on June 26, 1968, the District Court entered its judgment in accordance with the verdict of the jury which found for the Respondent and against the Petitioners.

The pertinent facts of this case are summarized as follows:

The charitable deduction herein involved was based upon a Deed of Gift executed by Petitioners on December 16, 1963, which conveyed to the City of Tucson, Arizona, a portion of a larger parcel of real property for street purposes, said street being hereinafter referred to as 16th Avenue.

Petitioners had entered into an option on or about May 17, 1963, to purchase the entire parcel of real property from the United Presbyterian Church. The option provided that it could be exercised at any time by the Petitioners and, in the event the church obtained rezoning to permit use for a trailer court or shopping center, Petitioners would be obligated to exercise the option.

Shortly after May 17, 1963, the church applied to the Tucson City Planning and Zoning Commission for such zoning. In connection therewith a tentative plat, which proposed the dedication of 16th Avenue, was presented to the Zoning Commission. Following hearings, the Zoning Commission recommended approval of the plat and the rezoning, and on or about November 6, 1963, transmitted the recommendation to the City Council which had final authority to approve the rezoning. On or about December 9, 1963, Petitioners exercised their option and completed the purchase of the real property and on December 16, 1963, Petitioners conveyed 16th Avenue to the City of Tucson for street purposes by way of a Deed of Gift. Subsequently, the City Council, on April 6, 1964, adopted an ordinance approving the rezoning.

The position of the Respondent throughout the trial was that although a legal gift had been made to the City (*i.e.* no consideration was received by Petitioners nor were Petitioners compelled to make the transfer) it did not qualify as a charitable deduction under Section 170 of the Internal Revenue Code of 1954 because the intent of the Petitioners in transferring 16th Avenue was to assist in obtaining the rezoning[1] and to directly benefit the remaining portions of Petitioners property.

To show direct benefit to Petitioners, Respondent offered and

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[1]There was no evidence demonstrating that the City of Tucson required the public dedication of 16th Avenue.

the trial court allowed into evidence[2] an "Audograph" sound recording of a hearing before the Zoning Commission which was attended by Petitioner, Robert C. Stubbs. It was contended by the Respondent that such sound recording contained a statement by said Petitioner that a benefit would accrue to his remaining property as a result of the dedication of 16th Avenue. At the trial, Petitioners introduced evidence to show they knew at the time the dedication was made that it would be of no benefit to them and in fact economically harmful to their remaining property.

The trial court, in effect, instructed the jury that even if the transfer was voluntarily made, without receiving consideration therefore or without being in any way compelled or required, it nevertheless did not qualify as a charitable deduction under Section 170 of the Internal Revenue Code of 1954 if Petitioners expected to in some way benefit from such transfer even if such benefits did not materialize.

The judgment of the District Court was timely appealed to the United States Circuit Court of Appeals for the Ninth Circuit under 28 U.S.C. Section 1291 and was affirmed. The Court of Appeals approved the inquiry into the motive and purpose of the transfer of 16th Avenue on the basis of *DeJong v. Commissioner*, 309 F.2d 373 (9th Cir. 1962) and *United States v. Transamerica Corp.*, 392 F.2d 522 (9th Cir. 1968) and, although acknowledg-

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[2]Petitioners objected to the admissibility of the sound recording on the basis that a proper foundation was not laid under *Todisco v. United States*, 298 F.2d 208, 211 (9th Cir. 1961), *cert. denied*, 368 U.S. 989 (1962). The District Court found that a proper foundation was laid and the Court of Appeals affirmed. Petitioners do not urge that this ruling is a reason for granting the writ but reserve the right to raise the question in the event this petition is granted. In this regard Petitioners submitted interrogatories in an attempt to discover items such as the sound recording; however, the trial court sustained Respondent's objections to such interrogatories on the basis of work product privilege. The Court of Appeals affirmed on the basis there was no showing of prejudice but questioned the application of the work product privilege. Petitioners also reserve the right to raise this question in the event this petition is granted.

ing that the evidence concerning motive and purpose prior to the transfer was conflicting, concluded that the verdict of the jury was amply supported by the record.

## REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals below should be reviewed because it erroneously defines the term "charitable contribution", as contained in Section 170(c) of the Internal Revenue Code of 1954, in such a manner that will make it impossible to administer this area of the federal tax law in a consistent manner. Either the decision below is in conflict with decisions of two other Courts of Appeals, or if it is not so in conflict, it involves an important question of federal tax law which has not been, but should be, settled by this Court. In either event this Court should grant review.

### I

The decision below involves a direct conflict with the decision of the First Circuit in *Crosby Valve & Gage Co. v Commissioner*, 380 F.2d 146 (1st Cir. 1967), *cert. denied* 389 U.S. 976 (1967) and that of the Eight Circuit in *Wardwell's Estate v. Commissioner*, 301 F.2d 632 (8th Cir. 1962).

The Eight Circuit in *Wardwell's Estate v. Commissioner, supra*, found that an enforceable pledge to endow a room in a church home for the aged in anticipation of possible occupancy by the taxpayer was a charitable contribution since the taxpayer did not have a legally enforceable right to room occupancy and, therefore, received no legal consideration. The case rejected the application of "detached generosity" gift standards, set out in *Commissioner v. Duberstein*, 363 U.S. 278 (1960), to charitable contributions. The decision of the Ninth Circuit in the instant case, however, relied on *DeJong v. Commissioner, supra*, which applied the "detached generosity" gift standards of the *Duberstein* case, *supra*, to charitable contributions.

The *Wardwell* case, *supra*, further indicates that unless legal consideration is present, the deductibility of an otherwise valid gift would not be affected by a motive or an expectation of receiving some benefits from the charity. This view also conflicts with the decision below in the instant case.

The First Circuit in *Crosby Valve & Gage Co. v. Commissioner*, *supra*, also rejected the *Duberstein* definition of a gift as applied to charitable contributions. It held that the inquiry into subjective judgments as to what prompts the financial support of charities should be avoided and so long as the transfer is made to an exempt charitable organization that alone should be the controlling factor.

It is submitted that the decision below clearly conflicts with the decisions of the First and Eighth Circuits and thus gives rise to the necessity for the settlement of the disputed question.

Furthermore, the decision below by relying on *DeJong v. Commissioner*, *supra*, which in turn relied on *Commissioner v. Duberstein*, *supra*, probably extends the holding of this Court in *Duberstein* beyond its original intendment. It should be recalled that *Duberstein* involved the question of excluding from the gross income of individuals the value of property acquired by gift and in no way involved a gift to charity. Since the law positively encourages gifts to charities but not of individuals, it is submitted that the restrictive definition of a gift contained in *Duberstein*, should not be applied to charitable contributions.

## II

The question presented regarding the definition of "charitable contribution" has never been before this Court and a proper definition thereof is of considerable importance in the administration of the federal tax law.

The effect of the decision below on the administration of the federal tax law in a consistent manner is well illustrated by the opinion in *Crosby Valve & Gage Co. v. Commissioner*, *supra*, at pages 146-147:

". . . Were the deductibility of a contribution under section 170 (c) of the Internal Revenue Code of 1954, to depend on 'detached and disinterested generosity,' an important area of tax law would become a mare's nest of uncertainty woven of judicial value judgments irrelevant to eleemosynary reality. Community good will, the desire to avoid community bad will, public pressures of other kinds, tax avoidance, prestige, conscience-salving, a vindictive desire to prevent relatives from inheriting family wealth — these are only some of the motives which may lie close to the heart, or so-called heart, of one who gives to a charity. If the policy of the income tax laws favoring charitable contributions is to be effectively carried out, there is good reason to avoid unnecessary intrustions of subjective judgments as to what prompts the financial support of the organized but non-governmental good works of society."

If the decision of the court below is permitted to stand, the taxing authorities, to consistently apply the law, would have to delve into the subjective intent of every transfer to a charity. This would involve an insurmountable task and lead to many inconsistencies. Furthermore, with such uncertainties as to whether or not a contribution is deductible, charities, gifts to which are positively encouraged by the law, will suffer. Therefore, settlement of the definition of "charitable contributions" by this Court is plainly in the public interest as it affects a large number of citizens of his country and possibly all charities.

## CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a Writ of Certiorari should be granted.

*Respectfully submitted,*

J. MERCER JOHNSON
1100 Transamerica Building
Tucson, Arizona
*Counsel for Petitioners*

*Of Counsel:*

G. EUGENE ISAAK
Dunseath & Stubbs, P.C.
Suite 300, 150 N. Stone Ave.
Tucson, Arizona 85701

October, 1970

## APPENDIX

## IN THE
## UNITED STATES DISTRICT COURT
## FOR THE
## DISTRICT OF ARIZONA

ROBERT C. STUBB and
MARY ANN STUBBS,
*Plaintiffs.*

v.

UNITED STATES OF AMERICA,
*Defendant.*

No. Civ.-2321-Tuc.

(June 26, 1968)

*[Court's Instructions to the Jury]*

THE COURT: Members of the jury, now that you have heard all of the evidence in the case and have had the benefit of counsel's arguments, the time has come for me to instruct you as to the law governing the case.

• • •

The plaintiffs have brought this suit for refund of income taxes that they allege they overpaid. The Government has denied there was an overpayment. The evidence presented has shown that in 1963 the taxpayers deeded to the City of Tucson some parcels of land to be used as a street and they claimed a charitable deduction on their 1963 income tax return for the value of this land. The Government contends the deeding of the land was not motivated by any charitable intent, but rather to gain economic benefit. The issue you must determine is whether the taxpayers are entitled to a charitable contribution. If the deeding of the land was not charitably motivated, you must return a verdict for the

defendant, for the United States. If you find there was a charitable contribution by the taxpayers, the plaintiffs, you must find a verdict for the plaintiffs.

You are instructed that to prove their claim the plaintiffs must establish every essential element of their case by a preponderance of the evidence ,and if they do yu must bring in a verdict for the plaintiffs. If, on the other hand, the proof fails to establish any essential element of the plantiffs' case by a preponderance of the evidence, you must bring in a verdict for the Government, for the defendant.

By a preponderance of the evidence is meant to prove that something is more likely so than not. In other words, a preponderance of the evidence means such evidence as when considered and compared with that opposed to it has more convincing force and produces in your mind a belief that what is sought to be proved is more likely true than not true.

Where the evidence is evenly balanced and you are unable to determine in your minds which way the scales should tip, then the taxpayer, the plaintiffs, have failed to carry their burden of proof and the Court instructs you you must bring in a verdict for the defendant, the Government.

A charitable contribution or gift is one that is made from detached and disinterested generosity. That is, it must be given out of affection, respect, admiration, charity or like impulses. The taxpayer must do more than merely show a gift was made or that the gift was voluntarily made. If the gift was voluntarily made for business reasons or to secure a direct economic benefit to the taxpayer or his remaining property, the gift does not qualify for the charitable deduction, even though it was made voluntarily without legal compulsion.

You are to be concerned only with the taxpayers' intent at the time the gift was made. Do not concern yourselves with events or circumstances that may have occurred subsequent to the gift,

except as such events or circumstances may aid you in determining the plaintiff's state of mind at the time the gift was made.

You are instructed that Section 170 of the Internal Revenue Code of 1954 allows an income tax deduction for a charitable contribution. You are instructed further that under that section of the Internal Revenue Code a charitable deduction is defined as, first, a contribution or gift, second, made to or for the use of a political subdivision, and the State of Arizona and the City of Tucson are political subdivisions, and, third, for exclusively public purposes.

You are instructed that as used in Section 170 of the Internal Revenue Code the term contribution or gift means a voluntary transfer of property without any consideration or compensation, without being compelled or required in any substantial way to make such transfer. Therefore, if you find from the evidence that the plaintiffs made the transfer of 16th Avenue to the City of Tucson voluntarily, without receiving any consideration or compensation, and without being compelled or required by the City of Tucson to make such transfer, then you shall find that the transfer of 16th Avenue was a contribution or gift.

Should you find that a contribution or gift was made by the plaintiffs, then you must determine from the evidence if such contribution or gift was made for exclusively public purposes. In this regard I instruct you if you find from the evidence that the motive of the plaintiffs primarily and substantially in making the contribution to the City of Tucson was for the public good, and, if you find further that any benefits accruing to the plaintiffs from the contribution were only incidental to the public purpose and benefit, then you should find that the gift was for an exclusively public purpose. On the other hand, if you find from the evidence that the plaintiffs obtained, as a result of their contribution, direct benefit or benefits as distinguished from the incidental benefit which inured to the general public from their contribution and thus indirectly to the plaintiffs as members of the public, then

you should find that the plaintiffs' contribution was not for exclusively public purposes.

If you find from the evidence that the plaintiffs' conveyance of 16th Avenue to the City of Tucson was for a public purpose and that as a result of the conveyance some benefit did accrue to the remaining property of th plaintiffs in Freeway Acres, but you find also such benefit was the same in degree and in kind as the benefit which accrued to the other property in the vicinity, or property of others in the vicinity, then you should find that the benefit to the plaintiffs was only incidental to the public purpose of the plaintiffs' gift.

I instruct you that if the plaintiffs at the time of making the conveyance to the City of Tucson believed that the dedication of 16th Avenue would provide better access to the plaintiffs' entire property or provide more desirable and suitable street frontage for the proposed shopping center than would be provided by easement or private street, and if this belief was a substantial factor in causing the plaintiffs to make the gift, then the gift was not charitably motivated.

I instruct you that if the plaintiffs made the gift because they believed it would also helpful in obtaining favorable rezoning, and this belief was a substantial factor in causing the plantiffs to make the gift, then the gift was not charitably motivated.

It is not necessary that the City of Tucson have an ordinance requiring the dedication, nor even that the city have legal power to compel the taxpayers to make the dedication. In this connection you are instructed that the State of Arizona and the City of Tucson have no Statute or ordinances requiring the dedication of property for road purposes in order to obtain rezoning.

I instruct you that the fact that the plaintiffs expected and intended by their conveyance of 16th Avenue to the City of Tucson to obtain a charitable deduction upon their Federal income

tax for the year 1963 must not be considered by you as a benefit accruing to the plaintiffs as a result of their gift.

• • •

(Recess)

(Jury returns to the courtroom)

THE COURT: Mr. Foreman, has the jury arrived at a verdict?

THE FOREMAN: Yes, we have.

THE COURT: Would you hand it to the Bailiff, please? Thank you, sir.

The clerk will read and record the verdict.

THE CLERK: "In Civil 2321-Tucson. In the United States District Court for the District of Arizona. Robert C. Stubbs and Mary AnnStubbs, husband and wife, plaintiffs, v. United States of America, defendant. We, the jury, find the issues in favor of defendant, United States of America, and against the plaintiffs, Robert C. Stubbs and Mary Ann Stubbs. Dated June 26, 1968. Floyd L. Casey, Foreman."

THE COURT: That concludes your services in the case, members of the jury. Thank you very much for the service that you rendered in the case. You are excused now until further call. Thank you. Stand at recess.

• • •

(68-2 U.S.T.C. par. 9570.)

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

---

ROBERT C. STUBBS and MARY ANN STUBBS, husband and wife,
*Plaintiffs-Appellants,*

vs.

UNITED STATES OF AMERICA,
*Defendant-Appellee.*

No. 23,810

[June 16, 1970]

On Appeal from the United States District Court for the District of Arizona

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Before: MERRILL and KOELSCH, Circuit Judges, and BYRNE, District Judge*

MERRILL, Circuit Judge:

The question presented by this appeal is whether appellant taxpayers are entitled to a charitable deduction for property deeded to the City of Tucson for a public road. A deduction was claimed on taxpayers' 1963 income tax return and was rejected by the Commissioner. The alleged deficiencies were paid and this suit for a refund was brought. Following a jury trial judgment was rendered for the Government denying appellants their refund.

Taxpayers had entered into an agreement to purchase certain property contingent on its rezoning to permit use for a trailer court and shopping center. A plat was prepared for presentation to the Tucson City Planning and Zoning Commission. To assure access to the portion intended for a mobile home development

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* Honorable William M. Byrne, Senior United States District Judge for the Central District of California, sitting by designation.

the plat provided for dedication of a strip of the property as a public road. The road would also provide access or frontage for some of the remaining property, for an unrelated public school, church and home for the aged. Following hearings the Zoning Commission recommended approval and the City Council enacted a rezoning ordinance. Taxpayers then completed their purchase and made the contemplated transfer to the city.

The position of the United States throughout these proceedings has been that the purpose of the transfer was to benefit directly the remaining portions of taxpayers' property,[1] and to assist in obtaining the necessary rezoning,[2] that under these circumstances the dedication was not for a charitable purpose under § 170 of the Internal Revenue Code of 1954 (26 U.S.C. § 170), but for anticipated economic gain. The United States relies on this court's decisions in *United States v. Transamerica Corp.*, 392 F.2d 522 (9th Cir. 1968); and *DeJong v. Commissioner*, 309 F.2d 373 (9th Cir. 1962). The District Court accepted this view and the jury was accordingly instructed that if such was the taxpayers' purpose a refund could not be allowed.

Taxpayers contend that purpose does not control in such a case as this and consequently that the instructions were erroneous and prejudicial. They assert that here the dedication was not compelled by law or by such coercive conditions as were present in the *Transamerica* case. In such a case as this, they contend, the

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[1] At the hearing before the Zoning Commissioner taxpayer Robert Stubbs expressed the opinion that such benefit would result, although at trial he presented evidence indicating that he had thought that the dedication would be of no value, or economically harmful to the property.

[2] The City of Tucson apparently does not require *public* road access to mobile home developments, but *access* to the interior is required. A private road or roads thus might have been sufficient. There was evidence presented that the City, on many but not all occasions, has required road dedications as conditions precedent to rezoning. The City Planning Director testified at the trial that he could not say whether the plat would have been found acceptable for rezoning in the absence of the public road.

dedication was charitable in fact, regardless of motive, and that the purpose of or motive for it is irrelevant. We disagree.

The inquiry into motive and purpose here does more than probe the subjective attitude of the donors and the extent to which public spirited and charitable benevolence prompted their action. The inquiry serves to expose the true nature of the transaction: that, as the jury found, the "gift" (as in *DeJong*)[3] was in expectation of the receipt of certain specific direct economic benefits within the power of the recipient to bestow directly or indirectly, which otherwise might not be forthcoming. Taxpayers apparently wished to assure favorable zoning (otherwise uncertain) by guaranteeing public access to the mobile home development, and to secure public street frontage for some of their property. In both respects their objectives were realized.

Taxpayers complain that in fact the dedication has not increased the value of their property; that the allegedly anticipated economic benefits have failed to materialize, an dthat the record makes this clear. This, however, is not the test. Taxpayers' subsequent disappointment in the ultimate monetary value of the benefits sought and received cannot affect the situation.

On the basis of *DeJony v. Commissioner* and *United States v. Transamerica Corp., supra,* we conclude that the District Court here did not err in instructing the jury. The evidence concerning taxpayers' motive and purpose prior to the transaction is conflicting,[4] but the jury's verdict finds ample support in the record.

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[3] Although the facts in *DeJong* revealed somewhat clearer evidence of a "trade off" (a "voluntary" contribution to the church school where appellants' child was enrolled) or *quid pro quo* than those in the instant case, we find the *DeJong* approach equally applicable here. See *United States v. Transamerica Corp.*, 392 F.2d 522, 524 (9th Cir. 1968).

[4] See note 1, *supra.* There was also considerable testimony concerning the value of creating two corners by way of a public access road, the "cost" of permanently splitting the property with a public road, and the advantages, if any, offered by a public road over a private road.

We find several additional assignments of error to be without merit. It was not error to admit an "Audograph" sound recording of appellant Robert Stubbs' appearance before the Zoning Commission. The relevance of the recording is obvious; there is no claim that it did not accurately reflect taxpayer's statements, that it was incomplete, or that the voices were not those of the persons identified. The preliminary hearing held by the court out of the presence of the jury satisfied all the criteria for admission of the recording under *Todisco v. United States*, 298 F.2d 208, 211 (9th Cir. 1961), *cert. denied*, 368 U.S. 989 (1962).

Taxpayers challenge the District Court's sustaining of respondent's objections to certain interrogatories. Although there is some question whether the work product privilege was properly applied here, we need not decide that question, since there has been no showing of prejudice.

Finally, taxpayers contend that a motion for summary judgment should have been granted because the United States failed to file controverting affidavits under Rule 56(e), F.R.C.P. Taxpayers' reading of Rule 56(e) in this respect is incorrect. As the Supreme Court recently stated:

> "• • • [B]oth the commentary on and background of the 1963 amendment [adding part (e) to Rule 56] conclusively show that it was not intended to modify the burden of the moving party under Rule 56(c) to show initially the absence of a genuine issue concerning any material fact." *Adickes v. Kress & Co.*, ..... U.S. ..... (June 1, 1970) [slip opinion at 14].

The existence of genuine issues of fact in this case was beyond question.

Judgment affirmed.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

---

ROBERT C. STUBBS and
MARY ANN STUBBS,
husband and wife,
*Plaintiffs-Appellants,*

vs.

UNITED STATES OF AMERICA,
*Defendant-Appellee.*

No. 23,810

[July 16, 1970]

On Petition for Rehearing

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Before: MERRILL and KOELSCH, Circuit Judges,
and BYRNE, District Judge

Rehearing is denied.

The opinion filed herein June 16, 1970, is modified in the following respects:

1. The sentence commencing "Following", line 4, page 2 of the slipsheet printing, is modified to read as follows:

> "Following hearing the Zoning Commission recommended approval of the plat and rezoning, and transmitted the recommendation to the City Council. Approximately three weeks later taxpayers completed their purchase and made the contemplated transfer to the city. The rezoning ordinance was formally adopted by the City Council some four months later."

2. That portion of the opinion commencing "The relevance," five lines from the bottom of page 3 of the slipsheet printing and ending with the end of that paragraph, is modified to read as follows:

"The preliminary hearing held by the court out of the presence of the jury satisfied the requirements of *Todisco v. United States*, 298 F.2d 208, 211 (9th Cir. 1961), *cert. denied*, 368 U.S. 989 (1962). As *Todisco* indicates, the question of the admissibility of recordings is one of adequate foundation; whether the recording as a whole is trustworthy is largely within the sound discretion of the trial judge. In the present case, the judge was satisfied that the location, approximate date, and principal speakers had been identified, and that the recording as a whole was accurate and sufficiently complete. We find no abuse of discretion in this respect. Appelant misconstrues *Todisco* in assuming it holds a recording inadmissible unless it is identified by the person who actually made it."

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

---

ROBERT C. STUBBS and
MARY ANN STUBBS,
husband and wife,
*Plaintiffs-Appellants,*

vs.

UNITED STATES OF AMERICA,
*Defendant-Appellee.*

Civ-2321-Tuc.
No. 23,810
(D.C. #2321)

APPEAL from the United States District Court for the District of Arizona.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Arizona and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmative with costs in this Court in favor of the appellee and against the appellants.

| | | |
|---|---|---|
| Costs: | Brief of the appellee ..... | $129.58 |
| | Reproduction of the record ..... | 11.94 |
| | | $141.52 |

Filed and entered June 16, 1970.